ADMINISTRATION OF BUSINESS AND DISCIPLINE BY THE COURTS

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In a *Memorandum on the Report of the Board of Statutory Consolidation on the Simplification of Civil Practice in the State of New York*, submitted to the legislature of the state of New York by the Lawyers' Group for the Study of Professional Problems, the importance of radical change in the administration of justice was emphasized and at least a dozen points thoroughly canvassed. This paper will be devoted to the consideration of but two of the points covered in the memorandum.

A. The Necessity for Effective Control of the Business of the Court

The draft of a proposed Judiciary Article for the Constitution of the state of New York, prepared by the same group and presented to the Constitutional Convention of 1915, contained the following:

> Section 4. The administrative business of the court shall be conducted by a board of assignment and control composed of the chief justice and the presiding justices of the several divisions of intermediate appeal. Every power adequate to that end is conferred upon it. It shall promulgate rules for conducting the judicial business of the court, and common forms for use therein. In the absence of action by the legislature it may prescribe rules of evidence. It shall from time to time prescribe the terms and parts of the court, define the jurisdiction of the divisions and parts, and assign justices to service therein.

The theory of this provision is that "We should apply to our (judicial) machinery the ordinary tests of efficiency that men apply in the business field. Does the thing work with the least waste of motion, and if it does not, where can motion be saved?" [1]

In every business enterprise authority for supervising the administration of the business is centered somewhere. The details of organized management—executive and factory—such as

[1] *Memorandum*, p. 5.

routing of the work, are designed by modern efficiency engineers with the purpose in view of economizing motion, of avoiding duplication of effort, and of concentrating energy in those places when and where it is most required. In such public quasi-judicial bodies as interstate commerce commissions, public service commissions, workmen's compensation commissions and the like, the chairman or the secretary is usually the administrative head and arranges things precisely as in a large business enterprise the manager arranges the organization machinery so as to dispose of the business with the least possible waste of time and energy. The signatories to the memorandum submitted to the legislature expressed the belief that in New York state the machinery for the administration of justice was "as archaic a vehicle as the stage coach, and as wasteful as pumping water by hand" and urged that the legal profession "be awakened from its drowsy contentment and . . . . apply its genius to the betterment of its own working machinery." [2]

There is some difference in detail between the plan proposed by this group and the plan outlined by the American Judicature Society. In the latter plan the administrative business of the court is to be in the hands of the chief justice, a procedure successfully put in practice by the Municipal Court in Chicago. In the Group's plan the administrative business is entrusted to a judicial board, rather than to a single individual. In so large a state as New York, with a different local problem for each judicial department, it seemed wiser to vest such administrative power in a board composed of the chief justice of the court of highest resort and the presiding justices of the several divisions of intermediate appeal. But whether the Chicago or the New York method be applied, is there any doubt of the soundness of the principle that responsibility and power for operating judicial machinery should be centered in a single executive authority?

B. THE EXERCISE OF DISCIPLINARY POWERS BY THE COURT

Section 9 of the proposed Judiciary Article provided:

> The justices of the court shall annually elect a committee of discipline composed of five justices and two members of the bar who shall have been admitted

[2] *Memorandum*, p. 5.

for at least fifteen years. The committee shall maintain discipline among the justices of the court, the official staff of the court, and the members of the bar, and shall promulgate canons of ethics for the court and bar. It shall have authority, after due hearing, to give reproofs, publicly or privately, impose fines, suspend any member of the official staff from office and any member of the bar from practice, to recommend to the board of assignment and control the removal from office of any justice or member of the official staff, and to disbar any member of the bar.

This provision was described by the signatories of the memorandum as "the most important of all the recommendations of this draft." The significance of this proposal lies in the power it would vest in a committee, consisting of justices of the court and members of the bar, of disciplining members of the court, as well as members of the bar. At the present time, the machinery of the court for disciplining lawyers is set in motion by the bar through associations of lawyers maintaining grievance and discipline committees. These associations, at great expense, maintain investigatorial departments, pay attorneys, and, in addition, draft members of the bar for the trial and prosecution of cases. Indeed, the courts have come to depend almost entirely upon the operation of this extra-judicial auxiliary. In the First Department nearly all of the disciplinary cases brought against members of the bar are conducted either by the Association of the Bar of the city of New York or the New York County Lawyers' Association.[3] If the duty of disciplining lawyers rests upon the bar, why should not the expense of the service be borne by the entire bar? Why should it be borne only by those who chance to be members of the association undertaking and performing the service?

The work of disciplining lawyers—at least in New York—is now efficiently performed. But the importance of providing some method by which complaints against members of the judiciary may be heard and considered has not yet been realized either by the bar or by the laity. It is a serious thing for a single lawyer to make complaint against a judge, and, as the members of the Group say, "Legislative supervision through the process of impeachment and removal has proved an insufficient corrective." [4] In an article

[3] For an analysis of the expense and time consumed, see chapter I, *The Law—Business or Profession?* by the writer.

[4] *Memorandum*, p. 27.

on "Disbarment in New York," [5] Mr. Charles A. Boston calls attention to an early decision in New York, which holds that it is ground for disbarment to tell a judge to his face that he has rendered a corrupt decision and to reiterate it to an appellate court, with the statement that you are ready to prove it.[6] And Mr. Boston adds:

> In these democratic days, notwithstanding our constitutionally protected freedom of speech, a courageous lawyer, in the presence of a New York court or judge, whom he suspects, believes or knows to be open to criticism for subverting the ends of justice has not the same freedom of action, which once the prophet Nathan dared to exhibit before an absolute King of the Jews.[7]

On the other hand, the Federal Circuit Court of Appeals, in *Thatcher* v. *United States* (212 Fed. Rep. 801, at p. 807), held that where a judge is a candidate for reëlection, his qualifications may be

[5] Paper presented at the Thirty-sixth Annual Meeting of the New York State Bar Association, 1913. See *Thirty-sixth Annual Report of the Proceedings of the Association.*

[6] Matter of Murray, 11 N. Y. Supp., 336, G. T. Supr. Ct., 1st Dept., 1890, reported without opinion, 58 Hun. 604.

[7] Mr. Boston, further said:

Bible reading has not so long ceased to be a practice, that some of you will not recall the fable in which Nathan addressed King David. I, for one, hope that in the scrutiny which the courts are now undergoing, the judicial idea of the essential dignity of a court will be so modified that a lawyer may in some way lawfully read to an unjust judge, when necessary, a rebuke as telling as was Nathan's to David. You will recall that Nathan told to David the parable of the rich man and the poor man, the latter of whom had nothing save one little ewe lamb which he bought and nourished up, though the rich man had exceeding many flocks and herds; yet a traveller came to the rich man, for whom the rich man took the poor man's lamb, and dressed it for the man that was come to him.

"And David's anger was greatly kindled against the man; and he said to Nathan, as the Lord liveth, the man that hath done this thing shall surely die. And he shall restore the lamb fourfold, because he did this thing, and because he has no pity.

"And Nathan said to David, *thou art the man.*" (II Samuel XII: 5, 7.)

And then Nathan having explained the application of the parable to David's conduct in procuring the death of Uriah the Hittite, and marrying his widow, the great King David said unto Nathan:

"I have sinned against the Lord." (*Ib.*, 13.)

And I find that Nathan, instead of being disbarred, as he would have been if a New York lawyer, as utterly unfit to participate thereafter in the administration of justice, was actually summoned by David in his declining years, to anoint his son Solomon, the fruit of this condemned union, King over Israel. (I Kings 1: 34.)

freely discussed and summarily decided, and that a citizen does not "lose this right to criticize because he is a lawyer." Nor is his cricitism confined to what is " 'decent and respectful.' His criticism may be as indecent and disrespectful as the facts justify." Yet in that case the respondent attorney was disbarred because his criticisms, in the opinion of the court, went too far. It is true "that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity." [8] The privilege of the lawyer to criticize the ruling and conduct of courts carries with it "the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending."[8] And this applies even to a justice of the peace, who is "*pro hac vice* the representative of the law, as fully as the chief justice of the United States in the most important case pending before him."[8] If, then, the lawyer must maintain respect for the court and uphold its dignity, how shall he perform this duty when its performance involves justifiable and sound criticism of a judge's conduct?

In the administration of the Municipal Court of Chicago, by virtue of his office, the presiding justice, upon the complaints of lawyers who had real grievances, took to task one of the judges of the court and summarily disciplined him by removal to another district from the one in which he had been acting. Such a committee on discipline as is suggested in the draft Judiciary Article, made up of five justices and two members of the bar who have been practicing law for at least fifteen years, would be primarily charged with the duty of maintaining the respect and dignity of the court, and members of the bar would be protected in submitting to such a committee evidence of actual dereliction on the part of the court.

Whatever rules the courts adopt, whatever the system of jurisprudence, the administration of the law is in the hands of the judges. An efficient system for the administration of the law must, therefore, necessarily provide for a more modern and scientific distribution of the work of the judges and a more comprehensive exercise of disciplinary power. I have not dwelt in this article

[8] Matter of Pryor, an Attorney-at-Law. Supreme Court of Kansas, 1877. 18 Kan. 72, 26 Am. Rep. 747. Per Brewer, J.

upon other features of the proposed Judiciary Article. These *two* proposals, however, justify emphasis. The one relates to the *selection* and *distribution* of available judicial energy. The other relates to the enforcement of high ethical standards by both bench and bar through adequate disciplinary machinery.